SUPREME COURT, U. S.

MAY

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IN THE

SUPREME COURT OF THE

UNITED STATES

October Term 1968

No. [redacted] 139

JOSEPH J. REMENYI,

Petitioner,

vs.

ROBERT S. McNAMARA, Secretary of Defense, WALTER T. SKALLERUP, JR., Deputy Assistant Secretary of Defense,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND MOTION TO SUBSTITUTE CLARK M. CLIFFORD AS A RESPONDENT IN PLACE OF ROBERT S. McNAMARA

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MOTION TO SUBSTITUTE CLARK M. CLIFFORD AS A RESPONDENT IN PLACE OF ROBERT S. McNAMARA

When this proceeding was started the Honorable Robert S. McNamara was Secretary of Defense. Since on or about March 1, 1968, the Honorable Clark M. Clifford succeeded Mr. McNamara as Secretary of Defense. Petitioner respectfully requests the Court to substitute Secretary Clifford as a respondent in place of former Secretary McNamara.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Joseph J. Remenyi, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above captioned case on February 28, 1968.

OPINIONS BELOW

Ninth Circuit: The opinion of the court below in this case (Appendix A, infra, pp. A-1 to A-7), has not yet been reported.

District Court: There was no formal opinion of the District Court.

Petitioner, after fully exhausting his remedies under the Industrial Personnel Security Program, as provided by Executive Order 10865, 25 Fed. Reg. 1583, and Department Directive 5220.6 entitled "Industrial Personnel Access Authorization Review Regulation", dated July 28, 1960, and upon adverse determination by the Review Board, filed his complaint for declaratory relief, praying that the District Court hold that the procedures followed in the administrative proceedings were illegal, unlawful, unauthorized, and denied petitioner due process of law;

that the action of the respondents in the manner of conducting the hearings unlawfully and illegally resulted in denying petitioner the right to be gainfully employed and thereby earn a livelihood; that the action of the respondents in denying petitioner access to classified information was arbitrary, capricious, not supported by any evidence.

The District Court, after hearing testimony and reviewing all of the administrative proceedings, found in favor of petitioner and ordered the matter remanded to the administrative agency with directions that the said agency grant petitioner access to information of the armed services classified as secret. The District Court made its Findings of Fact and Conclusions of Law (Appendix B, infra, p. B-1), and entered its judgment on the 16th day of August, 1966 (Appendix B, infra, p. B-10).

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on February 28, 1968 (Appendix A, infra, p. A-1). The jurisdiction of the Court is invoked under 28 U. S. C. §1254(1).

QUESTION PRESENTED

Where the procedures invoked by an administrative agency in denying an individual access

authorization to classified material constitute an unconstitutional denial of due process to the individual and where the agency's action is otherwise improper, arbitrary and an abuse of discretion, does the District Court's power to fashion an appropriate remedy include the power to remand the cause to the administrative agency with directions to grant the individual access authorization to secret material.

STATUTES INVOLVED

Executive Order 10865, Department of Defense Directive 5220.6 entitled "Industrial Personnel Access Authorization Review Regulation", dated July 28, 1960, is involved (Appendix C, infra, p. C-1).

STATEMENT

Petitioner, an American citizen, was employed by the Rocketdyne Division of North American Aviation, Inc. at Canoga Park, California, from February 6, 1959 to December 1963 [R. 184-189]. After he was first employed, petitioner applied for clearance at the "Secret" level in February 1959. He was initially granted clearance at the "Confidential" level [T. 112]. Petitioner's application for clearance was made pursuant to the Industrial Personnel Security Program established by the provisions of Executive Order 10865, 25 Fed. Reg. 1583 and

Department of Defense Directive 5220.6 entitled "Industrial Personnel Access Authorization Review Regulation" dated July 28, 1960. [The pertinent provisions of Executive Order 10865 and of Directive 5220.6 are set forth as Appendix C. infra p. C-1.]

Petitioner was questioned at length by investigators representing the United States Navy and submitted to a polygraph examination in 1960 in connection with the processing of his application for clearance. In the meantime, petitioner continued working at the Rocketdyne Division of North American Aviation, Inc. Petitioner established himself in the neighborhood, purchased a home and assumed there was no problem regarding his application for clearance. In November 1963 almost five years after his employment at Rocketdyne and his application for clearance, he was notified that his then existing clearance had been revoked. Rocketdyne Division of North American Aviation, Inc. was required to terminate his employment because of his lack of clearance [R. 184-189].

Petitioner requested that the matter be heard by the Field Board of the Industrial Access Authorization Review Board at the earliest possible time. Petitioner has been unable to find steady employment in the United States during the last approximately four and one-half years due to his lack of security clearance. He could find no steady employment at all from January 1964 until January 1966 when he obtained a job with a company in West Germany [R. 113-116]. This required him and his wife to live outside

the United States in Mannheim, West Germany [R. 128].

Petitioner filed his complaint in the District Court on the 28th day of July, 1965, in which he alleged the procedure accorded him was violative of due process; that respondents were without authorization to have taken the action denying him a clearance employing the procedures used; and that the action taken by the Field Examiner and Central Board had been arbitrary and an abuse of discretion. Specific matters were alleged regarding the improper admission of evidence including improper authentication of documents and lack of confrontation with the witness testifying against him [R. 2]. This complaint was filed pursuant to the Administrative Procedure Act, 5 U. S. C. §500, et seq. The scope of the court's power under this Act is specified in 5 U. S. C. §706 [formerly 5 U. S. C. §1009(e)], Appendix C. infra, p. C-33].

After a complete hearing in the court below where the entire transcript of the administrative proceedings was in evidence, the court found substantial errors in the administrative proceedings amounting to a denial of due process. Further, the testimony of the witness testifying against petitioner was stricken from the record because of its improper admission and use based upon the government's failure to confront petitioner with the witness both in the administrative proceedings and in the court below [R. 255]. The District Court had ordered respondents to produce their secret witness in court [R. 147]. Respondents failed to do this despite the court

order. Without such purported "evidence" there is nothing in the record to support respondents' contention that petitioner was not trustworthy and should be denied access. The only evidence properly to be considered by the administrative body hearing the matter was favorable to petitioner.

Petitioner prior to, at the time of the hearing, and to the present, had been and is a loyal American citizen. He had been successful in his employment since entering this country. His employers, all of which had their own security procedures, recommended him as a good, trustworthy employee. There was no evidence of his taking or attempting to take any secrets despite the fact he had been employed in the defense industry for several years. Respondents must not have been too concerned about his veracity and trustworthiness since they apparently had all the same information in their files since at least 1960 when he was interviewed and examined by representatives of the Navy, which examination was in part with the aid of a polygraph. After that examination and investigation respondents permitted petitioner's then clearance to remain in effect for approximately three years and petitioner continued at the same job at the Rocketdyne Division for which he was applying for his secret clearance.

Based upon the improper procedures taken by respondents and the fact that there was no negative evidence in the record the court below found that the administrative determination failed to conform to the requirements of due

process, was arbitrary and an abuse of discretion. In its findings of fact it listed among other things the following:

> "a. [Petitioner] was not permitted to confront the witness testifying against him nor to know the witness' identity;
>
> "b. The transcript of the personal appearance proceedings held February 12, 1964, was destroyed without authority and there no longer is any record of that portion of the proceedings;
>
> "c. Counsel representing [Respondents] improperly contacted the members of the Central Industrial Personnel Access Authorization Board outside the presence of [Petitioner] or [Petitioner's] counsel and without consent on the part of [Petitioner] or [Petitioner's] counsel;
>
> "d. Evidence not properly authenticated was admitted into the record of the personal appearance proceeding and considered by the Field Board and the Central Board; . . . . ."

The District Court further found that on the administrative record, "the granting of access authorization to [Petitioner] for information classified at the 'secret' level is clearly consistent with the national interests." [R. 188].

The judgment ordered the testimony of the secret witness expunged from the administrative

record [R. 254-255] and "That [Petitioner] be granted access authorization to information classified as Secret by the United States Army, Navy and Air Force; . . ." [R. 255], and that the matter be remanded to the administrative body for proceedings in accordance with the judgment [R. 255].

Summarizing, this case presents what we had hoped would never again happen in the security field (or in any other field of government), under our system of rule by law. It involves a condemnation and "conviction" of an American citizen of charges made by a faceless accuser.

The government appealed only from that portion of the District Court order which directed that petitioner be granted access to material classified at the "secret" level. The United States Court of Appeals for the Ninth Circuit held that the action of the District Court raised constitutional questions but refused to decide those questions and reversed the portion of the District Court's order to which the government had objected.

REASONS FOR GRANTING WRIT

I

The writ should be granted because there is a conflict of decisions in the Courts of Appeal in that certain decisions direct administrative agencies to reinstate or reemploy persons who have been dismissed under directives of the Executive Department. See Vitarelli v. Seaton, 359 U.S. 535 (1959); Pellerini v. Celebrezze, 226 F. Supp. 176; Webb v. Celebrezze, 226 F. Supp. 394; Edwards v. Celebrezze, 220 F. Supp. 79; Service v. Dulles, 354 U.S. 363 (1957); Peters v. Hobby, 349 U.S. 331 (1955); and Coleman v. United States, 363 F. 2d 190, decided incidentally by Court of Appeals for the Ninth Circuit, and which found the proceedings of the Department of Interior to be arbitrary, capricious and an abuse of discretion, and remanded the case to the Department of the Interior for further proceedings and decision in accordance with principles therein enunciated, which is tantamount to directing the Secretary of the Interior to enter judgment for Coleman and grant the relief prayed for.

Respondents make much of the fact that the action of the District Court in this case results in doing violence to our historical concept of division of powers. While it is gratifying to know that this administration is aware of this historical philosophy in our government, we question the right of the Executive Department to establish a government of a bureaucratic character alien to our system. Wherever as

here fundamental rights depend upon the facts and finality to facts becoming in effect finality in law, the ultimate decision belongs to the Judiciary. See Cromwell v. Beason, 285 U.S. 57, 61.

In a case such as here, where there is no valid evidence that petitioner was or is a security risk; where the Department's own directives were, as government counsel have admitted in their brief, ignored and violated; where the fundamental right of confrontation was denied, not upon any alleged grounds of protecting the national security, but upon the personal convenience of a witness unrelated to national security; unless the Court intervenes and cures the arbitrary, capricious acts of the Department of Defense, the result will be that an American citizen who has been loyal to his country and dedicated to his efforts to advance the war efforts of the nation, is deprived the rights guaranteed him in the Fifth Amendment of the United States Constitution (Greene v. McElroy, 360 U.S. 474).

A cursory reading of the record will show a design on the part of the government representatives not only to ignore their own directives under which allegedly they were acting, but a flagrant disregard of the rights of the petitioner as an American citizen. Records were destroyed at the direction of the attorney for the Defense Department presenting the matter; the attorney for the Defense Department discussed the case with the Review Board without permission of and not in the presence of petitioner or his counsel; evidence not authenticated was admitted into the

record, considered by the Field Board and by the Central Board; there was indifference to expediting the proceedings, as the result of which petitioner, as in the Greene case, was out of employment for over four years. Petitioner made all efforts to speed final determination, but to no avail. Justice delayed is justice denied as much in an administrative proceeding as in a court of law. The record is replete with requests for expediting all steps of the proceeding, but bureaucratic arrogance not only slowed the consideration of the case but denied petitioner's rights granted him under the Fifth Amendment. As stated above, upon judicial review the District Court after hearing the evidence, held completely for the petitioner.

The Ninth Circuit handed down a reversal and affirmance which leaves petitioner shorn of his constitutional rights guaranteed under the Fifth Amendment. Under this decision petitioner shall be required to go through the identical steps heretofore taken which will constitute a sham. The Defense Department had several years to marshal its evidence to prove its unwarranted charges and conclusions. It is therefore inequitable to deny petitioner his constitutional rights when a United States District Court has found the charges are utterly without merit. Nor does the extra-judicial direction of the Court of Appeals to strike findings of the District Court not even appealed from, add judicial luster to this confusing opinion.

II

A. Petitioner is an American citizen who was employed by the Rocketdyne Division of North American Aviation, Inc. for nearly five years. During this time he purchased a home in a neighborhood near his place of employment and established himself as a member of the community. Petitioner applied for security clearance when he commenced working for North American Aviation and was cleared for access to "Confidential" information. In 1960, the year after he commenced his employment, petitioner submitted to a polygraph examination, which he passed most favorably, in connection with his application for security clearance. Then in November of 1963 petitioner was suddenly informed that his "Confidential" clearance had been revoked and that he would not be authorized to receive secret material. This development forced North American Aviation to terminate petitioner's employment despite the fact that they were impressed with the quality of his work.

Petitioner then sought review of the decision denying him access authorization before the Field Board of the Industrial Access Authorization Review Board. The initial hearing was held in February 1964. Petitioner is still waiting for this matter to be resolved.

The administrative hearing which was held resulted in a denial of petitioner's position. However, as was subsequently held by the District Court, the procedures invoked by the Board were arbitrary, capricious, and an abuse of

discretion and resulted in an unconstitutional denial of petitioner's right to due process of law. The government has not appealed from this finding so the petitioner's present position is that his government has arbitrarily and capriciously decided that he should not receive access authorization to classified material.

Petitioner's particular skill is in the field of materials and liquid propulsion engineering associated with aviation and space technology and he has been unable to find employment in this area because access authorization is a prerequisite. Therefore, in January of 1966 he was forced to leave his country and accept a job in Mannheim, West Germany. This uprooting was directly caused by the refusal of the government to issue petitioner access authorization.

The District Court had before it the entire administrative record. With all of this information before it and with the evidence concerning the particular situation of petitioner, the District Court found that it was arbitrary and an abuse of discretion for the Department of Defense to determine that it would not be in the national interest to grant petitioner access authorization. Then exercising its equitable power to fashion an appropriate remedy to redress an unconstitutional action, the District Court ordered the Board to grant petitioner access authorization to material classified at the "Secret" level. The government then appealed. But the government did not challenge the finding that its actions had been arbitrary and an abuse of discretion in that (1) petitioner was not permitted to confront the

witness testifying against him; (2) the transcript of the personal appearance proceedings held February 12, 1964, was destroyed without authority and there no longer is any record of that portion of the proceedings; (3) counsel representing the government improperly contacted the members of the Central Industrial Personnel Access Authorization outside the presence of petitioner or his counsel and without consent on the part of petitioner or his counsel; and (4) evidence not properly authenticated was admitted into the record of the personal appearance proceeding and considered by the Field Board and the Central Board. Nor did the government appeal from the finding by the District Court that there was no evidence which would support a denial of petitioner's request for access authorization. The only portion of the District Court order which was appealed from was that portion which directed the government to grant petitioner access authorization. In other words, the government admits that it used procedures which unconstitutionally denied petitioner his right to be gainfully employed in his own country, and the government further admits that it has no evidence which it can use to support a finding that petitioner should be denied access authorization. Yet the government has chosen to further delay petitioner's enjoyment of his constitutional rights by appealing from that portion of the order which directed it to take the step which was the only permissible step remaining open to it. Therefore, at this time, four and one-half years after petitioner was originally forced out of his job, he remains a man who cannot practice his chosen profession

in his own country. And the tragedy is that absolutely no valid reason exists for this sorry circumstance.

B. It is submitted that the issue in this case is simply how long must petitioner wait before the unconstitutional abridgment of his civil rights is rectified. The District Court with all the facts before it decided, pursuant to its equitable powers to form such remedies, that petitioner's redress should be immediate. This decision made within the sound discretion of the trial judge was reversed on appeal to the Court of Appeals for the Ninth Circuit. The Appellate Court reversed this decision and held "that the district court ought to have awaited the proceedings before making a determination which involves the constitutional principle of separation of powers."

It is submitted that this holding is erroneous because it sanctions an administrative stall and because it over-emphasizes the importance of the constitutional question.

C. The government in its brief to the Court of Appeals emphasized the importance of the doctrine of separation of powers and argued that the judiciary should not overstep its bounds. The government continually analogyzed to the executive's right to hire and fire his employees. This right is based on the ground that these employees directly represent the executive and act in his behalf. But the government cannot truly be arguing that they possess arbitrary power in this situation because they have

admitted that the court had jurisdiction to pass on the constitutionality of their procedures and indeed to declare them void. Further, the government has not objected to the District Court finding that their action was arbitrary and an abuse of discretion. Therefore, it is submitted that the constitutional question here is not separation of powers but whether or not the government should be allowed to delay indefinitely the implementation of petitioner's constitutional rights.

D. In Watson v. City of Memphis, Tenn. (1963), 373 U.S. 526, 10 L. Ed. 2d 529, 83 S. Ct. 1314, Mr. Justice Goldberg stated that "[t]he issue in this case, simply stated, is whether the City of Memphis may further delay in meeting fully its constitutional obligation under the Fourteenth Amendment to desegregate its public parks and other municipal recreational facilities." [10 L. Ed. 2d at p. 532.] In this case the District Court and the Court of Appeals had both ruled that the City of Memphis could delay. However, the Supreme Court overturned these rulings despite "the District Court's undoubted discretion in the fashioning and timing of equitable relief." [10 L. Ed. 2d at p. 539.] In support of this result the court noted that the "rights here asserted are, like all such rights, present rights; they are not merely hopes to some future enjoyment of some formalistic constitutional promise. The basic guarantees of our Constitution are warrants for the here and now, and unless there is an overwhelming compelling reason, they are to be promptly fulfilled." [10 L. Ed. 2d at p. 535.] Therefore, this Court

chose to exercise its discretionary power and grant the petitioners in that case a writ of certiorari so that their constitutional rights could be immediately vindicated. This is exactly what your petitioner is requesting in this petition.

Petitioner's basic civil right to seek gainful employment has been unconstitutionally abridged, and he is merely seeking prompt redress so that he can return to his country and his community. The government has managed to prolong this proceeding until now over four and one-half years have elapsed since petitioner's clearance was revoked. Therefore, it is submitted that this case, like the case of Watson v. City of Memphis, involves a situation which calls for an exercise of the Supreme Court's discretionary power to grant certiorari.

CONCLUSION

The true constitutional issue involved in this case concerns how long petitioner must wait for the vindication of his constitutional rights. The District Court, in its sound discretion to devise equitable remedies and with all the evidence before it, decided that petitioner's relief should be immediate. This decision should be reinstated in this case, and petitioner should not be forced to endure another protracted proceeding before the administrative board and

all the attendant appeals before he is allowed to again practice his specialty in his home community.

Respectfully submitted,

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